88-1669

N O. _____

Supreme Court, U.S.
F I L E D
APR 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BILL HAMILTON, MICHAEL NEEL GLEASON, and DAN M. LINKOUS,

PETITIONERS

v.

HONORABLE THOMAS J. STOVALL, as PRESIDING JUDGE OF THE SECOND ADMINISTRATIVE JUDICIAL DISTRICT OF TEXAS,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Michael Neel Gleason
Petitioner pro se
P. O. Box 6151
Pasadena, Texas 77506
(713) 477-0007

Dan M. Linkous
Petitioner pro se
1526 Kingwood Drive
Kingwood, Texas 77339
(713) 358-6838

DIRECT ALL SERVICE AND CORRESPONDENCE TO: BILL HAMILTON
PETITIONER PRO SE
214 WEST BROADWAY
PASADENA, TX 77506
(713) 477-0007

QUESTIONS PRESENTED

1. May the district court *sua sponte*; without due notice and opportunity to oppose, before service to defendant and answer; dismiss this *pro se* complaint based on 42 U.S.C. Section 1983 that seeks declaratory and prospective injunctive relief from an alleged custom, usage, pattern and practice that fails to provide due notice for judicial recusal proceedings that finally decide a challenge to a state trial court's fairness and impartiality?

2. Did the court of appeals abuse its discretion by affirming dismissal of this case, by assessing severe double cost sanctions for a frivilous appeal under Rule 38, Fed.R.App.P., and by failing to publish the opinion where the court of appeals upheld the grounds for appeal -- *sua sponte* dismissal and abstention were improper -- but affirmed the dismissal on a different theory?

LIST OF ALL PARTIES

Billy Vance Hamilton, Jr. -- Petitioner

Michael Neel Gleason -- Petitioner

Danny Michael Linkous -- Petitioner

Honorable Thomas J. Stovall -- Respondent

James M. Murphy -- Former Appellate Counsel for Petitioners

Attorney General of Texas -- Counsel for Respondent

TABLE OF CONTENTS

QUESTIONS PRESENTED ---------- i

LIST OF ALL PARTIES ---------- ii

TABLE OF AUTHORITIES ---------- v

OPINIONS BELOW ---------- 2

JURISDICTION ---------- 3

STATUTES AND RULES INVOLVED ---------- 4

STATEMENT OF THE CASE ---------- 6

REASONS FOR GRANTING THE WRIT ---------- 11

1. INTRODUCTION ---------- 11

2. THE DISTRICT COURT HAS JURISDICTION OF AND MAY NOT DISMISS, BEFORE SERVICE OF SUMMONS AND NOTICE AND OPPORTUNITY TO OPPOSE DISMISSAL, A CLAIM SEEKING GENERAL DECLARATORY AND PROSPECTIVE INJUNCTIVE RELIEF UNDER 42 U.S.C. SECTION 1983 AGAINST A STATE ADMINISTRATIVE JUDGE'S CUSTOM, USAGE, PATTERN AND PRACTICE THAT FAILS TO PROVIDE DUE NOTICE FOR JUDICIAL RECUSAL PROCEEDINGS THAT FINALLY DECIDE A CHALLENGE TO A STATE TRIAL COURT'S FAIRNESS AND IMPARTIALITY ---------- 13

3. DISMISSAL, SANCTIONS AND FAILURE TO PUBLISH THE OPINION ARE IMPROPER HERE ---------- 27

CONCLUSION ---------- 32

CERTIFICATE OF SERVICE ---------- 33

TABLE OF CONTENTS- continued

APPENDIX ---------- 34

A -Order of United States District Court, 22 September 1987---------- 34

B -Order of United States District Court, 22 October 1987---------- 35

C -Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, 3 October 1988---------- 36

D -Order of the United States Court of Appeals for the Fifth Circuit, 14 December 1988---------- 43

E -Complaint in Cause No. H-87-2953 filed in the United States District Court for the Southern District of Texas, Houston Division, 18 September 1987---------- 44

TABLE OF AUTHORITIES

CASES	PAGE
Affholder v. Southern Rock,Inc., 746 F.2d 305 (5th Cir. 1984)	31
Bell v. Hood,327 U.S. 678 (1945)	15,18,23
Coghlan v. Starkey,852 F2d 806 (5th Cir. 1988)	28,29
Delatte v. Genovese, 273 F.Supp. 654 (E.D. La. 1967).	24
Dist. Col. Court of Appeal v. Feldman, 460 U.S. 462 (1983)	15,21,22, 27
Estelle v. Gamble, 429 U.S. 97 (1976)	16
Hale v. Harney, 786 F.2d 688 (5th Cir. 1986)	9,10,14 15,21,22, 27,29
Maier v. Orr, 758 F.2d 1578 (Fed. Cir. 1985)	30
Marbury v. Madison, 1 Cranch (US) 137 (1803)	23
Mitchum v. Foster, 407 U.S. 225 (1972)	18
Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1949)	20
In Re Murchison, 349 U.S. 133 (1954)	19

Nichols v. Schubert, 499 F.2d 946 (7th Cir. 1974) 16

Offutt v. United States, 348 U.S. 11 (1954) 19

Philidelphia Co. v. Stimson, 223 U.S. 605 (1911) 23

Pulliam v. Allen, 466 U.S. 522 (1984) 15,22

Scheuer v. Rhodes, 416 U.S. 232 (1974) 18

Sterling v. Constantin, 287 U.S. 378 (1932) 23

Tuney v. Ohio, 273 U.S. 510(1927) 19

Ex Parte Virginia, 100 U.S. 339 (1880) 23,24

UNITED STATES CONSTITUTION

amendment five 4,8,26

amendment fourteen 5,8,19, 21

FEDERAL STATUTES

28 U.S.C. Section 1254(1) 3

28 U.S.C. Section 1331 4,5,21

28 U.S.C. Section 1343(a)(3)& (4) 4,5,21

42 U.S.C. Section 1983 4,6,13,17 21,25

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 38 6,30

TREATISES

Miller, Wright & Cooper, Federal Practice and Procedure, Section 3564 at 70-71 (1984) 25

Section 3984 (1977) 31

N O. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BILL HAMILTON, MICHAEL NEEL GLEASON, and DAN M. LINKOUS,

PETITIONERS

v.

HONORABLE THOMAS J. STOVALL, as PRESIDING JUDGE OF THE SECOND ADMINISTRATIVE JUDICIAL DISTRICT OF TEXAS,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Bill Hamilton, Michael Neel Gleason, and Dan M. Linkous, pro se, petition for writ of certiorari to review the judgment and order of the United States

Court of Appeals for the Fifth Circuit, entered on 3 October, 1988, affirming the order of the United States District Court for the Southern District of Texas dismissing Petitioners' complaint.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, entered 3 October 1988, has not been reported and is set forth in the Appendix hereto at p. 36. The Fifth Circuit's denial of the petition for rehearing, entered 14 December 1988, is set forth at p. 43. No opinion or memorandum was provided in support of denial of rehearing. The judgment of the United States District Court for the Southern District of Texas, entered 22 September 1987, dismissing the complaint has not been reported and is set forth at p. 34. The District Court's unreported order, entered 22 October 1987, in response

to Respondent's attempt to answer after dismissal is set forth at p. 35. No opinion nor memorandum was provided in support of the District Court's orders.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit affirming the dismissal of Petitioners' Complaint and assessing double costs as sanctions for a frivilous appeal was entered on 3 October 1988 and the denial of the petition for rehearing was entered on 14 December 1988. The ninetieth (90th) day after denial of rehearing is 14 March 1989. On 13 March 1989 Justice White granted an extension of time until 13 April 1989 to file this Petition for Writ of Certiorari. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1).

Below Petitioners appealed from the sua sponte dismissal by the District Court for the Southern District of Texas, before

Defendant had been served or answered, of their pro se complaint seeking declaratory and prospective injunctive relief, along with attorney's fees, under under 42 U.S.C. Section 1983, et seq. Jurisdiction of the district court is pursuant to 42 U.S.C. Section 1983, 28 U.S.C. 1331, and 28 U.S.C. Section (a)(3) and (4). A true rendition of the Complaint is included in the Appendix at pp. 44-60. The District Court later dismissed Respondent's motion to dismiss as moot because the complaint had been previously dismissed.

STATUTES AND RULES INVOLVED

-U.S. CONST. amend. V., provides, in pertinent part:

> "No person shall ... be deprived of life, liberty, or property, without due process of law ... ."

-U. S. CONST. amend. XIV, Section 2., provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

-28 U.S.C. Section 1331. Federal Question.

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

-28 U.S.C. Section 1343. Civil rights and elective franchise, provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> > (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

-42 U.S.C. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

-Federal Rule of Appellate Procedure 38.

Damages for Delay

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

The essential facts alleged in the pro se complaint (p.47+) to support plaintiffs' claim of the denial of their fourteenth amendment rights to due process and equal protection of the laws are the following:

1. Plaintiffs filed their Complaint (p44-60)in the United States District Court for the Southern District of Texas, Houston Division, on September 18, 1987. The verified Complaint (p.60) described in detail a course of conduct on the part of Defendant Honorable Thomas J. Stovall as Presiding Judge of the Second Administrative Judicial District of Texas, in connection with his duties under Texas law after a motion to recuse a presiding judge has been filed, that, plaintiffs contended, deprived them and those similarly situated of due process of law in their efforts at assuring a fair and impartial tribunal.

2. The individual Plaintiffs set forth facts showing a custom, usage, policy and practice on the part of defendant, in his official capacity under color of state law, of arbitrarily depriving state court civil and divorce litigants of fair and adequate

notice of the assignment of judges to hear judicial recusal motions filed, and depriving them of fair and adequate notice of hearings to be held on the recusal motions (p. 56). The Plaintiffs contend that the pattern and practices employed by the defendant were not only contrary to clearly defined state law, but that they deprived the Plaintiffs and class members, of their right to "Due Process of law and their right to a fair and impartial tribunal." (p. 56). The Plaintiffs sought injunctive relief to prevent a continuation of the practices set forth in the Complaint and class certification to "prevent continuing and inevitable abridgement of the Plaintiffs' and the class members' Constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution. (p. 44,56,59).

3. After the compliant was filed on September 18, 1987, the District Court entered

an Order dated September 22, 1987, summarily dismissing the Complaint on abstention grounds. (p. 34). The dismissal was without notice and hearing to Plaintiffs. Counsel for Defendant sought to enter his appearance and file a Motion to Dismiss which the District Court declared moot by Order entered October 22, 1987. (p. 35).

4. Plaintiffs filed their notice of appeal on October 22, 1987. The United States Court of Appeals for the Fifth Circuit affirmed the dismissal of Plaintiffs' complaint and awarded double costs to defendant in an unpublished opinion entered 3 October 1988.(pp36-42). The Court of Appeal held that Hale v. Harney, 786 F.2d 688 (5th Cir.1986), not the abstention doctrine, controls the dismissal of this case. The Court of Appeals affirmed on different grounds than those relied on by the District Court. The Fifth Circuit

found that under Hale v. Harney the district court lacked jurisdiction of this case and assessed double costs against Petitioners for filing a frivolous appeal. Petitioners were represented by counsel in the original appeal to the Court of Appeals. Counsel withdrew in response to the cynically invidious animus of the opinion and severe sanctions imposed by the Court of Appeals. Petitioners were required to continue the appeal pro se. On 2 November 1988 the Fifth Circuit granted enlargement of time until 1 December 1988 to file petition for rehearing. Petitioners' timely filed their petition for rehearing which was denied without opinion on 14 December 1988. (p. 43).

5. On 13 March 1989 Justice White granted an extension of time until 13 April 1989 to file this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. INTRODUCTION

The holdings below that sua sponte, before service of summons to the defendant state judge, dismissed (p. 34) and affirmed dismissal (p. 36) of Petitioners' action (p. 44) seeking equitable protection from an alleged state court pattern and practice of preventing challenges to alleged judicial bias and partiality by systematically conducting hearings that the challenger cannot meaningfully attend or participate in warrants this Court's review because the precedent here, although veiled by cryptic orders (p. 34) and an unpublished opinion (p. 36), represents a serious lack of confidence in the rule of law at all subordinate levels and attempts to replace open accountability and integrity with an irrational pyramid of concealment, alibi, intimidation and tyranny against the most helpless of victims, naive "scab" pro se

litigants who believe that honorable men, women and institutions are honest, fair and just. The continued success of this scheme is a loud and clear message to usurpers of our institutions of justice that they are free to replace the rule of law with their private agenda within their jurisdictions.

What means of control, intimidation and tyranny will replace unauthorized arbitrary, irrational, unpublished ("secret") sanctions against private citizens who continue to bravely demand their Constitutionally guaranteed rights to forthrightly seek to protect their families, rights and properties in an independent, fair and impartial legal forum that our government has a sworn duty to provide when citizens' objections to this dereliction become even more prevalent and forceful?

This type of cryptic order (p. 34) and unpublished opinion (p. 36) may not be

competent legal precedent available to the governed, but they serve as a loud and clear federal licensing, legitimation and suggestion, by acquiescence, of this procedure to all similarly inclined governing "insiders" that they should do likewise.

Because the Supreme Court is the guardian of the people's federal rights it should reverse this impatient fundamentally unjust abuse of our justice system and thereby reaffirm the rule of law in independent, fair and impartial trial and appellate forums, state and federal, in such a clear and firm manner that future temptation to such laxity are forever foreclosed.

2. THE DISTRICT COURT HAS JURISDICTION OF AND MAY NOT DISMISS, BEFORE SERVICE OF SUMMONS AND NOTICE AND OPPORTUNITY TO OPPOSE DISMISSAL, A CLAIM SEEKING GENERAL DECLARATORY AND PROSPECTIVE INJUNCTIVE RELIEF UNDER 42 U.S.C. SECTION 1983 AGAINST A STATE ADMINISTRATIVE JUDGE'S PATTERN AND PRACTICE THAT FAILS TO PROVIDE DUE NOTICE FOR JUDICIAL RECUSAL PROCEEDINGS THAT FINALLY DECIDE A CHALLENGE TO A STATE TRIAL COURT'S FAIRNESS AND IMPARTIALITY.

Petitioners' Complaint (p44-60) alleges

that Defendant Stovall's policy and practice of causing recusal hearings to be conducted without reasonable notice and opportunity to prepare for and to attend the hearing deprives them and others similarly situated of a fair and impartial tribunal in their state court divorce and civil cases without due process. The Complaint seeks declaratory and prospective injunctive relief against Judge Stovall's policy and practice.

The District Court's sua sponte pre-answer dismissal (p. 34) was based on abstention. Petitioners, by counsel, appealed on the basis that abstention and dismissal were inappropriate. The Court of Appeals overruled the abstention theory and upheld dismissal on the basis of the lack of jurisdiction under their decision in Hale v. Harney, 786 F.2d 688 (5th Cir.1986). (p. 37). Petitioners' arguments

for rehearing were based on Hale v. Harney (underlaid by the Rooker-Feldman Doctine) not being applicable to the facts of this case seeking equitable remedies; but that the District Court has subject matter jurisdiction under Bell v. Hood, 327 U.S. 678, and Pulliam v. Allen, 466 U.S. 522.

In addition to Hale v. Harney's inapplicability to this claim for equitable relief, there is a more fundamental incongruity because this was a sua sponte dismissal before service to and response by the Defendant whereas Hale deals with a dismissal based on motion of the defendants that was granted after the plaintiff was given an opportunity to clarify his complaint and oppose dismissal.

The Court of Appeal's affirmance of dismissal is based on the theory that the District Court lacks jurisdiction of Petitioners' claims. (p.42).

Although some circuits have held that a

district court may dismiss an action sua sponte for lack of jurisdiction and before issuance and service of summons in prisoner's in forma pauperis cases, Petitioners do not believe that the Supreme Court has ever directly addressed this issue wherein filing fees have been paid and summons issued but not served as in this case. In this regard it is noted that Justice Steven's dissent in Estelle v. Gamble, 429 U.S. 97, specifically pointed out that

> [a]t least one Circuit has held that dismissal without service on the defendants is improper, Nichols v. Schubert, 499 F.2d 946 (7th Cir. 1974). The Court's disposition of this case should not be taken as an endorsement of this practice [of sua sponte dismissal for failure to state a claim before issuance of summonses] since the question was not raised by the parties.

Estelle v. Gamble, 429 U.S. 97 at 111 n.5 (Stevens, J., dissenting).

It would be improper for the Court of Appeals to base its dismissal on want of

subject matter jurisdiction after addressing the merits of Petitioners' claims, but the district court's subject matter jurisdiction of the claims are shown below in this argument. In addition, the opinion (p. 37) recognizes Petitioners' allegations that Judge Stovall's actions may be substantial errors, but disclaims interest because "such errors are no business of ours." (p. 40) that must be corrected on appeal through the state courts to this Court. However, the opinion overlooks that the pro se complaint, liberally construed to favor Petitioners' position, clearly states a substantial claim for equitable relief cognizable under 42 U.S.C. 1983 that is not protected by any judicial immunity that Judge Stovall may attempt to claim and that Petitioners have a clear right to pursue that claim in the federal courts. "In congressional contemplation, the pendency of state civil proceedings was to be whole-

ly irrelevant. The very purpose of Section 1983 was to impose the federal courts between the States and the people, as guardians of the people's federal rights." Mitchum v. Foster, 407 U.S. 225, 242.

In Bell v. Hood, 327 U.S. 678 (1946), the Court explained that "a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such claim is wholly insubstantial and frivolous.: Id at 682-83. However, "[a] complaint should not be dismissed ... unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

Petitioners have important Constitu-

tionally protected rights to a fair and impartial tribunal and to reasonable notice of judicial proceedings under the Due Process Clause of the 14th Amendment.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness ... . [E]very procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Tuney v. Ohio, 273 U.S. 510,532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11.

In Re Murchison, 349 U.S. 133, 136 (1954). Here, Petitioners allege that Judge Stovall systematically prevents meaningful challenges to judicial bias by a practice and custom of "secret" settings and "surprise"

notice of recusal hearings such that Petitioners and other complaining litigants cannot be present nor prepared at hearings wherein final determination on claims of judicial bias are made.

This practice is prohibited because:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonable calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.

Mullane v. Central Hanover Bank & Trust Co, 339 U.S. 306,314 (1949) (citations omitted). Petitioners allege that they were given no actual notice (Gleason) or inadequate notice (Hamilton and Linkous) of the recusal hearing wherein a final determination was made without their being able to attend or meaningfully participate.

Petitioners brought their action under 42 U.S.C. Section 1983. (See, p. 45). By its terms, Section 1983 embraces Petitioners' claims that Judge Stovall's practice, custom and usage deprives them of rights "secured by the Constitution and laws," viz., due process rights to a fair and impartial tribunal and due notice of hearings provided under the Fourteenth Amendment. (See, p. 56). The complaint invokes the district court's jurisdiction under 28 U.S.C. Sections 1331 and 1343(a)(3) and (4). (See, P. 45).

In addition to Petitioners' contentions that the Fifth Circuit's Hale v. Harney Doctrine isn't applicable here, or in any other case wherein equitable relief on a substantial claim is sought, Petitioners believe that the Court's decision in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); on which Hale v. Harney is based, wherein Feldman's

general attacks on the Constitutionality of the Bar Rule were reversed and remanded; specifically upholds Petitioners' right to reversal in this case which seeks general declaratory and prospective injunctive relief rather than any review of the decisions in their specific recusal hearings. See, Feldman, 460 U.S. 462 at 487-88.

Pulliam v. Allen, 466 U.S. 522 (1984), rather than Hale v. Harney controls this case. In Pulliam this Court examined the precise issue in this appeal and concluded that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." 466 U.S. 522 at 541-42.

"Before deciding there is no jurisdiction, the district court must look to the way the complaint is drawn so as to claim a right to recover under the Constitution and the laws of the United States. ... [W]here

the complaint, as here, is so drawn under the Constitution or laws of the United States, the federal court, ... , must entertain the suit." Bell v. Hood, 327 U.S. 677, 681.

It is well established practice for federal courts to assume jurisdiction to issue injunction to protect rights safeguarded by the Constitution, Philidelphia Co. v. Stimson, 223 U.S. 605, 619-22, and to restrain individual state officers from doing what the 14th Amendment forbids the state to do. Ex Parte Virginia, 100 U.S. 339, 346-47. See, Sterling v. Constantin, 287 U.S. 378. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. Marbury v. Madison, 1 Cranch (US) 137, 162-63.

Judge Stovall is appointed to

preside over the Second Administrative Judicial District of Texas. The Texas Government Code sets out his administrative duties. (p. 46). Arguably Judge Stovall's acts are ministerial in this administrative function. Assigning a judge and causing notice to the parties, a mere administrative duty, does not establish rights to the parties, and therefore these acts lack the first element of judicial power. See Dellatte v. Genovese, 273 F.Supp. 654, 658 (E.D.La. 1967). See also, Ex parte Virginia, 100 U.S. 339, 348. Under the reasoning of these opinions when Judge Stovall acted contrary to the terms of a statute he could be liable for the damages caused by his conduct.

Petitioners' complaint, liberally construed and taken as true, clearly states a substantial claim (unconstitutional pattern and practice of failure to give due process

notice and hearing for recusal motions) for equitable relief under Section 1983. The test for dismissal is a rigorous one and if there is any foundation of plausibility to the claim, federal jurisdiction exists. Miller, Wright & Cooper, Federal Practice and Procedure, Section 3564 at 70-71 (1984).

NO REASONABLY ADEQUATE STATE REMEDY.

Although the district court suggested the state court route (p. 34), there is no reasonably adequate state remedy without first receiving a meaningful recusal hearing with reasonable opportunity to obtain witnesses and to present testimony for later appellate review. Petitioner Linkous was denied leave to seek mandamus relief in the Texas Supreme Court. The breadth of this pattern and practice to discourage and suppress evidence of judicial bias and interest can only be properly examined in a disinterested federal court. State Court

declaratory and prospective injunctive relief to Petitioners is unreasonable in the light of Judge Stovall's status of authority over the District Courts of Harris County where an application for state relief would be litigated. It is possible that this policy which tends to protect Texas State District Court judges from public accountability is the result of mutual self-serving "back scratching", with unwilling citizen litigants trapped in the lurch, between Judge Stovall and the state district judges he is charged by law to administer and supervise.

Further, the District Court's dismissal of Petitioners' cause of action without due notice and opportunity to oppose has deprived Petitioners of important rights in violation of the Due Process Clause of the Fifth Amendment. (See, p. 4).

3. DISMISSAL, SANCTIONS AND FAILURE TO PUBLISH THE OPINION ARE IMPROPER HERE.

The Court of Appeals' assessment of severe sanctions for a frivolous appeal; which the Court affirmed, in an unpublished opinion, based on an entirely new theory from the district court's reason for dismissal and based on the new, first impression of the Hale Doctrine applied to deny jurisdiction for substantial claims for equitable relief; is astounding and embarrassing and has intimidated Petitioners' appeal counsel to withdraw. It is noted that Hale does not address claims for equitable relief except, perhaps indirectly, where Hale is underlaid by Feldman. However, this Court clearly upheld jurisdiction of Feldman's equitable claims. Feldman, 460 U.S. 462, 486-88.

Of course, no appropriate authorities exist for this arbitrary abuse of sanctions and freezing out of credible pro se liti-

gants' use of appellate counsel within their limited financial capability. Coghlan v. Starkey, 852 F2d 806 (5th Cir. 1988) is cited in the opinion (p. 42) to support sanctions for a frivolous appeal. In Coghlan the Fifth Circuit justified appellate sanctions "for an appellate brief that fails to argue any case law, makes hardly any attempt to distinguish precedents relied upon below, argues the merits in the most conclusory fashion, and offers no independent legal analysis different from that decisively rejected by the district court.". Id. at 809. Here, the district court, sua sponte, dismissed, without supporting opinion or memorandum, apparently on abstention grounds. (p. 34). Petitioners appealed, by counsel, that dismissal and abstention are inappropriate. The Court of Appeals agreed that the district court's abstention grounds were improper, (p. 37),

took false inflamatory "pro-divorce" allegations from Respondents' moot pleadings, (p. 37), created a new expansion of the Hale doctrine to uphold sua sponte dismissal of equitable claims and assessed severe sanctions for a frivolous appeal.(p44-60). The Court of Appeals' failure to explain the reasons for its finding that the appeal is frivilous when both the Complaint (p.44) and the Appeal are clearly meritorious suggests that the finding of frivolity and the assessment of sanctions are unwarranted. Petitioners contend that careful reading of the Coghlan opinion, cited by the Court of Appeals to support its sanctions, would produce the opposite conclusion, ie., that the appeal was meritorious and therefore not frivolous. In this regard, Coghlan at 811, explains that "[a]n appeal is frivolous if the result is obvious or the arguments of error are wholely without merit." By overruling the district

court's abstention holding, the opinion admits the merit of Petitioners' arguments against the district court's result based on abstention. The purpose of Rule 38, Fed.R.App.P., is to sanction unnecessary damages or delays to Appellee (emphasis added). Here any delays and damages to the Appellee are self-imposed by his persisting to submit moot appellate pleadings and briefs in a cause in which he has not been properly joined and which are specifically excluded by the District Court's 22 October 1987 Order(p.35) which the opinion ignored.

The Federal Circuit, in Maier v. Orr, 758 F.2d 1578 (1985) held that Rule 38, Fed.R.App.P., is not applicable where the appellant [sic] did not respond to a frivolous motion to disqualify a justice of the Court of Appeals. 758 F.2d at 1584. Here all pleadings and efforts of Respondents are moot pursuant to the District Court's

22 October 1987 Order. (p. 35).

The Fifth Circuit's opinion in Affholder, Inc. v. Southern Rock, Inc., 746 F.2d 305 (1984) seems to conflict directly with its assessment, without specific support in its findings, of the severe sanctions in this case. In Affholder the Court explained that

> [d]amages may be imposed only when the appellate court finds "the appeal to be utterly without merit, the appellant's arguments totally unsound, the judges' time and energies wasted, and the appellee put to the inconvenience and expense of employing counsel to resist such a frivilous appeal." 16 C.Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure, Section 3984 (1977).

Affholder, 746 F.2d at 308-09. Presumably similar findings would be required for assessment of punitive double costs. No such findings were made in the opinion. (p. 36-42).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for Writ of Certiorari be granted, that the judgment of the court below be reversed, and that the case be remanded to the district court for further proceedings and trial.

Respectfully submitted,

Billy Vance Hamilton, Jr.
214 West Broadway
Pasadena, Texas 77506
(713) 477-0007

Michael Neel Gleason
P. O. Box 6151
Pasadena, Texas 77506
(713) 477-0007

Danny Michael Linkous
1526 Kingwood Drive
Kingwood, Texas 77339
(713) 358-6838

Petitioners, pro se

CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served by my service of a true and correct copy of the foregoing upon Mr. Robert L. Lemens, Assistant Attorney General, State and County Division, P. O. Box 12548, Austin, Texas 78711-2458, by depositing same in the United States Mail, postage pre-paid, certified mail, return receipt requested, on this _____day of _____, 1989.

_____
Michael Neel Gleason

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BILL HAMILTON, et. al.,
Plaintiffs CIVIL ACTION NO. H-87-2953

VS.

HONORABLE THOMAS J. STOVALL,
AS PRESIDING JUDGE OF THE
SECOND ADMINISTRATIVE
JUDICIAL DISTRICT OF TEXAS,
DEFENDANT

ORDER

ENTERED SEPTEMBER 22, 1987

This Court hereby abstains from any action in this case as this case should be properly filed in the State Court. Plaintiff's request for a temporary restraining order is DENIED. Therefore, this case is DISMISSED.

Done at Houston, Texas, this 22nd day of September, 1987.

/s/
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BILL HAMILTON, et. al.,
Plaintiffs CIVIL ACTION NO. H-87-2953

VS.

HONORABLE THOMAS J. STOVALL,
AS PRESIDING JUDGE OF THE
SECOND ADMINISTRATIVE
JUDICIAL DISTRICT OF TEXAS,
DEFENDANT

ORDER
ENTERED OCTOBER 22, 1987

On October 14, 1987 counsel for Defendant filed a Rule 1 motion to represent Defendant in this cause of action as well as a motion to dismiss. Since this case was dismissed on September 22, 1987 these motions are MOOT.

Done at Houston, Texas, this 22nd day of October, 1987.

/s/
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-6152
SUMMARY CALENDAR

BILL HAMILTON, et. al.,

Plaintiffs-Appellants

VS.

HONORABLE THOMAS J. STOVALL,
as Presiding Judge of the
Second Administrative
Judicial District of Texas,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas
(CA-H-87-2953)

October 3, 1988

Before Politz, King, and Smith, Circuit Judges.

PER CURIAM:*

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide a particular cases on the basis of well-settled principles of law imposses needless expense on the public and burdens on the legal profession." Pursuant to that Rule the court has determined that this opinion should not be published.

The appellants are parties in various state court divorce proceedings. The appellants filed this suit in district court alleging that their due process rights had been violated when the appellee, a state court judge, failed to give them adequate notice, as required by Tex. R. Civ. P. Ann. r. 18a(d) (Vernon 1988), of the hearings on their recusal motions. The district court abstained from any action in the suit and dismissed the case. We find Hale V. Harney, 786 F.2d 688 (5th Cir. 1986), not the abstention doctrine, controls the dismissal of this case. Therefore, we affirm, albeit on somewhat different ground than that relied on by the district court.

I.

The Appellants are involved in Texas state court divorce proceedings. For these reasons, each of the appellants made a motion to recuse the trial judge presiding

over his case. In accordance with Tex. R. Civ. P. Ann. r. 18a(d),[1] the presiding judges forwarded the recusal motions to the Honorable judge Thomas J. Stovall to either set a hearing before another judge or to hear the motions himself. In either instance, notification of the parties concerning the parties was necessary to comply with the Rule 18a(d). The appellants allege that Judge Stovall failed to give them adequate notice of the hearings on their respective recusal hearings, and their motions were denied.

---

1 Texas Rules of Civil Procedure 18a(d) reads as follows:

If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district

Unsatisfied with such a result, the appellants filed suit against Judge Stovall in federal district court under 42 U.S.C. Section 1983 (1981), alleging denial of due process. The appellants sought both declaratory and injunctive relief. The district court abstained from any action in the suit, stating that the appellants should have filed their case in state district court. Therefore, the district court denied the appellants' request for a temporary restraining order and dismissed the case. the appellants filed timely notice of appeal.

---

shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their respective counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require. Tex. R. Civ. P. Ann. r. 18a(d) (Vernon 1988)

II.

"A question of federal jurisdiction may be raised at any time either by the court sua sponte or by motion of any interested party." Burks v. Texas Co., 211 F.2d 443, 445 (5th Cir. 1954). Relying on that power to raise the issue of jurisdiction, we find that the appellant's case is controlled by Hale v. Harney, 786 F.2d 688. In Hale, the Plaintiff (Dr. Hale) brought a Section 1983 action in federal court while his appeal from the state court divorce proceedings were still pending. The district court dismissed Dr. Hale's suit for lack of jurisdiction, and we affirmed. In Hale, we stated that "[j]udicial errors committed in state courts are for correction in the state court systems, at the head of which stands the United States Supreme Court; such errors are no business of ours." Id. at 691.

In the present case, the only issue is

an alleged judicial error by the Texas state court. Further, Tex. R. Civ. P. Ann. r. 18a(f) (Vernon 1988)[2] provides state court appellate review to correct the appellant's alleged judicial error. According to Hale, then, the alleged judicial error in the present case should be left to the state courts, and ultimately to the Supreme Court, to correct.

The appellants make three arguments on appeal: (1) abstention is inappropriate in this case; (2) dismissal of the case on abstention grounds without a hearing was improper; and (3) if abstention is

---

2 Texas Rules Of Procedure 18a(f) reads as follows:

> If the motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case. Tex. R. Civ. P. Ann. r. 18a(f) (Vernon 1988).

inappropriate, dismissal is not. Since we conclude that this case is beyond the jurisdiction of the district court, we need not address the appellants' arguments.

III.

For the foregoing reasons, we find that the district court lacked jurisdiction to hear this case. Therefore, we AFFIRM. This is a frivolous appeal, and the appellants are assessed double costs. Fed. R. App. P. 38; see Coglan v. Starkey, 852 F.2d 806 (5th Cir. 1988) (per curiam)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NO. 87-6152

BILL HAMILTON, et. al.,
Plaintiffs-Appellants

VS.

HONORABLE THOMAS J. STOVALL,
AS PRESIDING JUDGE OF THE
SECOND ADMINISTRATIVE
JUDICIAL DISTRICT OF TEXAS,
Defendant-Appellee

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING
(DECEMBER 14, 1988)

Before Politz, King, and Smith, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the Petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied

ENTERED FOR THE COURT:

/S/
CAROLYN D. KING
UNITED STATES CIRCUIT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BILL HAMILTON, et. al.,
Plaintiffs CIVIL ACTION NO. H-87-2953

VS.

HONORABLE THOMAS J. STOVALL,
AS PRESIDING JUDGE OF THE
SECOND ADMINISTRATIVE
JUDICIAL DISTRICT OF TEXAS,
Defendant

COMPLAINT
Filed September 18, 1987

TO THE HONORABLE COURT:

BILL HAMILTON, MICHAEL NEEL GLEASON, AND, DAN M. LINKOUS, herein after referred to as plaintiffs, file this their Complaint seeking declaritory and injunctive relief, along with attorney's fees, pursuant to 42 U.S.C. Section 1983, et. seq., and in support of same would show the Court as follows:

I.

JURISDICTION

The jurisdiction of this Court is

invoked under 28 U.S.C. Sections 1331 and 1343 (3) & (4), since this is an action arising under the Constitution and laws of the United States. Jurisdiction is further invoked under 42 U.S.C. Section 1983 et. seq.

II.

PARTIES

All parties to this suit are citizens of the United States.

Plaintiffs all reside in Harris County, Texas, which is within the Southern District of Texas, and are involved in civil litigation in Harris County, Texas. Each Plaintiff has filed motions to recusal in their respective cases, and thus have invoked the duties and responsibilities of defendant Stovall as Presiding Judge of the Second Administrative Judicial District of Texas.

Defendant Stovall is the Presiding

Judge of the Second Administrative Judicial District of Texas, who has been appointed by the Governor of the State of Texas, with the advice and consent of the Texas Senate. The Second Administrative Judicial District of the State of Texas includes Harris County, Texas, which is within the Southern District of Texas. As the Presiding Judge of the Second Administrative Judicial District of Texas, Defendant Stovall maintains supervisory control and authority over the district judges of Harris County, Texas. Defendant Stovall's duties under the Texas Government Code Section 74.031 et. seq., and the Texas Rule of Civil Procedure 18a, include the responsibility for the appointment of district judges to hear and preside over motions filed by litigants in the State of Texas, and Harris County, Texas, for recusal of District Judges who are presiding over certain civil cases.

III.

VENUE

Venue is proper in this Court since the acts and practices complained of herein have occurred or will occur within the Southern District of Texas. Furthermore, Defendant Stovall is resides within the Southern District of Texas and within the Second Administrative Judicial District of Texas.

IV.

FACTUAL STATEMENT

(a)

Plaintiff Bill Hamilton

Plaintiff Hamilton is involved in divorce litigation in Harris County, Texas. Initially, Hamilton's case was filed in the 308th Judicial District Court of Harris County, Texas, by Hamilton's wife, in cause number 83-58424, styled In the Matter of the Marriage of Shannon Heidi Beach and Billy Vance Hamilton, Jr. District Judge

Bob Robertson is the judge presiding over Hamilton's divorce. Plaintiff Hamilton is representing himself pro se in the divorce proceedings.

On August 3, 1987, the referenced cause was dismissed by Judge Robertson 1) for want of prosecution and 2) because Hamilton's wife's lawyer non-suited the case. When Plaintiff Hamilton received notice of the dismissal of the case on August 16, 1987, Hamilton's son began living with Plaintiff in Harris County, Texas, because Plaintiff feared his wife would leave the State of Texas or relocate the children of the marriage to another part of the State. On August 17, 1987, and during the dismissal of the referenced divorce action, Plaintiff Hamilton amended another existing suit pending in the 308th Judicial District Court of Harris County, Texas, to include a petition for divorce,

and an application for an immediate temporary restraining order against his wife taking the children from the jurisdiction of the court.

On August 24, 1987, Plaintiff appeared in Judge Robertson's court for a hearing on his application for temporary restraining order. In the meantime, Judge Robertson had signed a writ of habeas corpus (in the case which had been dismissed) directing Plaintiff to bring Plaintiff's son to court for return to Plaintiff's wife. When Plaintiff challenged Judge Robertson's authority to issue the writ in a case which was not pending, Judge Robertson advised Plaintiff's wife's attorney to file a motion to reinstate that case, but told Plaintiff to maintain possession of Plaintiff's son.

Due to certain conduct on the part of judge Robertson in the meantime, including contacting Plaintiff by telephone at work,

Plaintiff, on September 3, 1987, filed a motion to recuse Judge Robertson under Rule 18a, Texas Rules of Civil Procedure. On Friday September 4, 1987, Defendant Stovall signed an order, under Rule 18a, assigning another District Judge to hear the recusal motion filed by Plaintiff Hamilton, such hearing to be "at the convenience of the assigned judge and all interested parties." Plaintiff Hamilton did not receive notice of the entry of such order.

On September 8, 1987, the day after Labor Day, at approximately 9:30 a.m., Plaintiff received a phone call from the clerk of the 311th Judicial District Court of Harris County, Texas, who advised Plaintiff that he had missed the docket call on his motion to recuse Judge Robertson, and that Judge Elliott was waiting to hear the motion. Plaintiff advised his clerk that he had no notice of the hearing, and at that point Judge

Elliott got on the phone and directed that Plaintiff appear in his court at 11:00 a.m. to proceed with the motion to recuse. Plaintiff once again objected to the lack of due notice, which Judge Elliott ignored. At the time of the phone call, Plaintiff was at work and could not leave on such short notice.

At 10:00 a.m. on September 8, 1987, Plaintiff called Defendant Stovall on the telephone at defendant's office. Plaintiff asked Judge Stovall when he was going to assign a judge to hear his recusal motion and when the hearing was going to be set. Judge Stovall stated he had just received the motion for recusal in the mail, and that he had to talk to Judge Azios and find out who was available to hear it. Plaintiff then told Judge Stovall of his conversation with Judge Elliott. Defendant Stovall said that he had forgotten that his secretary probably had appointed Judge Elliott, and

that he would have his secretary call Plaintiff and fill him in on the matter. Defendant Stovall admitted to Plaintiff that his secretary handles all the appointments of judges in recusal matters. When Plaintiff complained of the lack of notice of the hearing, judge Stovall told Plaintiff that he did not need any more notice than a phone call.

Apparently, Judge Elliott overruled Plaintiff's recusal motion, and Judge Robertson proceeded to enter orders and contact school officials to the effect that they turn Plaintiff's son over to Plaintiff's wife.

(b)

Plaintiff Micheal Neel Gleason

Plaintiff Gleason has had a case pending before the 165th Judicial District Court of Harris County, Texas, styled Michael Neel Gleason v. J. Michael Coman, et. al., in cause number 86-48041. On

November 14, 1986, Plaintiff Gleason filed a Motion to Recuse the presiding judge of the court, Honorable Ken Harrison. On or before January 7, 1986, defendant Stovall signed an Order of Assignment of Judge Charles Sherrill, former Judge of the 112th Judicial District Court of Harris County , Texas, to hear and determine Plaintiff Gleason's Motion to Recuse, "To be set at the convenience of the assigned Judge and all parties of interest."

With no notice but purported telephonic communications to an answering machine to Plaintiff Gleason, the hearing on Plaintiff Gleason's motion to recuse was set for January 20, 1987, before Judge Sherrill. Judge Sherrill proceeded to hear evidence on the recusal, without the presence and attendance of Plaintiff Gleason, and entered an order denying the motion to recuse on its face.

(c)

Plaintiff Dan M. Linkous

Plaintiff Linkous has been involved in divorce litigation since April of 1983, in cause number 83-28196, styled In the Matter of the marriage of Nancy L. Linkous v. Danny Michael Linkous, in the 247th Judicial District Court of Harris County, Texas. After a jury trial and a Decree of Divorce was entered, certain post trial matters were still left pending, and defendant Stovall assigned Honorable Robert P. Walker, a district judge from Jefferson County, Texas, was assigned to preside over such hearings. after certain hearings took place, including a motion for contempt in which Plaintiff Linkous was adjudged in contempt by Judge Walker, he filed a motion to recuse Judge Walker under Rule 18a, Texas Rules of Civil Procedure. Defendant Stovall assigned another judge to hear the motion to recuse on November 18, 1986, to

be heard on November 22, 1986, at 8:30 a.m. Notice of the assignment reached the Harris County District Clerk's office Friday, November 19, 1986. Plaintiff never received any written notice of the hearing , and his attorney was contacted by telephone on November 19, 1986, and advised of the hearing set for the following Monday morning. Plaintiff's counsel filed a motion for continuance, which was denied, and the motion to recuse was overruled. Plaintiff attempted to obtain writs of mandamus from the Court of Appeals of Houston, and the Supreme Court, but leave to file such applications was denied.

Plaintiffs contend that the pattern and practices employed by defendant Stovall are not only contrary to state law [under Rules 18a, 21a, and 245, Texas Rules of Civil Procedure], but deprive plaintiffs, and the class members that they seek to

represent, Due Process of Law and their right to a fair and impartial tribunal. Injunctive relief against defendant Stovall, in favor of the Plaintiffs and the class they represent, is necessary to prevent continuing and inevitable abridgement of the Plaintiffs' and the class members' Constitutional right under the Fifth and Fourteenth Amendments to the United States Constitution.

IV.

CLASS ACTION

The named Plaintiffs bring this suit individually and, pursuant to rule 23 (a) and (b) (2), Federal Rules of Civil Procedure, on behalf of all residents of the State of Texas, in the Second Administrative Judicial District of Texas, and in Harris County, Texas, who 1) have or in the future will file motions to recuse presiding judges in civil cases under Rule 18a, Texas Rules of Civil Procedure; 2) are

or will have their motions to recuse referred to defendant Stovall for the performance of defendant Stovall's duties under the Texas Government Code and Rule 18a, Texas Rules of Civil Procedure; 3) and are or may in the future be subjected to the acts, practices, and procedures heretofore employed by defendant Stovall which deprive litigants of their rights to Due Process of Law and their rights to a fair and impartial tribunal within which to litigate their claims. This is a proper class action under Rule 23, Federal Rules of Civil Procedure in that, as to the class: 1) the persons affected are so numerous that joinder of all parties is impracticable; 2) there are common questions of law and fact; 3) the claims and defenses of the representative Plaintiff are typical of the class; 4) the representative Plaintiffs will fairly and

adequately protect the interests of the class; and 5) the parties opposing the class of plaintiffs have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief to the class as a whole.

Defendant Stovall is sued in his official capacity and, as the official supervisory representative of all District Judges within the Southern District of Texas, in the Second Administrative Judicial District, and within Harris County, Texas.

WHEREFORE, Plaintiff respectfully prays on his own behalf, and on behalf of those similarly situated, that this court:

1. Assume jurisdiction of this case and set this case promptly for a hearing;

2. Determine by order, pursuant to Rule 23 (c)(i) of the Federal Rules of Civil Procedure, that this action be maintained as a class action;

3. Grant Declaratory relief that the policy and practices of the defendant in denying litigants who file motions for recusal under Rule 18a their rights to due notice of hearing, and thus Due Process of Law, and their right to a fair and impartial tribunal within which to litigate their claims;

4. Grant preliminary and permanent injunctive relief against Defendant Stovall from applying the acts, practices and procedures described herein with respect to litigants who file motions for recusal under 18a, Texas Rules of Civil Procedure;

5. Award the Plaintiffs all costs, including attorneys' fees incurred in the bring of this action; and

6. Award Plaintiffs such other and further relief as this Court may deem just and proper.

Respectfully submitted,

Bill Hamilton

Michael Neel Gleason

Dan M. Linkous

VERIFICATION

STATE OF TEXAS *
COUNTY OF HARRIS*

BEFORE ME, the undersigned authority, on this day personally appeared MICHAEL NEEL GLEASON, BILL HAMILTON AND DAN M. LINKOUS, known to me to be the persons whose signatures appear hereinafter, who, after being by me duly sworn, stated upon their oaths that they have read the foregoing Complaint and that the contents thereof and the allegations therein are true, except as to such matters which are known by information and belief, and that those they believe to be true, and that they are entitled to the relief requested herein.

Signed: Michael Neel Gleason
Bill Hamilton
Dan M. Linkous

SUBSCRIBED AND SWORN TO before me on this ____ day of September 1987.

Signed: Notary Public in and for the State of Texas

NO: 88-1669

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

BILL HAMILTON, MICHAEL NEEL GLEASON, and DAN M. LINKOUS

Petitioners,

V.

HONORABLE THOMAS J. STOVALL, PRESIDING JUDGE OF THE SECOND ADMINISTRATIVE JUDICIAL DISTRICT OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

JIM MATTOX
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

PAUL D. RICH
Office of Attorney General
200 Main Plaza, #400
San Antonio, TX 78205
State Bar No. 16842500
512-225-1154

On the Brief:
Nancy J. Gonzalez
Law Clerk

NO: 88-1669

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

BILL HAMILTON, MICHAEL NEEL GLEASON, and DAN M. LINKOUS

Petitioners,

V.

HONORABLE THOMAS J. STOVALL, PRESIDING JUDGE OF THE SECOND ADMINISTRATIVE JUDICIAL DISTRICT OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

JIM MATTOX
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

PAUL D. RICH
Office of Attorney General
200 Main Plaza, #400
San Antonio, TX 78205
State Bar No. 16842500
512-225-1154

On the Brief:
Nancy J. Gonzalez
Law Clerk

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
INDEX OF AUTHORITIES	ii, iii
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT AND AUTHORITIES	
THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTIRCT COURT'S SUA SPONTE DISMISSAL OF PETITIONERS' CASE ON THE GROUNDS OF LACK OF JURISDICTION	3
THE COURT OF APPEALS WAS WELL WITHIN ITS DISCRETION IN ASSESSING DOUBLE COSTS AGAINST THE PETITIONERS FOR FRIVOLOUS APPEAL	6
THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION BY DECLINING TO PUBLISH ITS OPINION	7
CONCLUSION	9
CERTIFICATE OF SERVICE	11

INDEX OF AUTHORITIES

Cases	Page
Hale v. Harney, 786 F.2 688 (5th Cir. 1986)	4
Beers v. North American Van Lines, Inc., 836 F.2d 910, 912 (5th Cir. 1988)	5
Bridge & Mfg. Co. v. Otoe County, 120 U.S. 225, 7 S.Ct. 552, 30 L.Ed. 623 (1987)	5
Feigler v. Tidex, Inc., 826 F.2d 1435 (5th Cir. 1987)	5
Save the Bay, Inc., v. United States Army, 639 F.2d 1100, 1102 (5th Cir. 1988)	6
Coghlan v. Starkey, 852 F.2d (5th Cir. 1988)	6
Atwood v. Union Carbide Corp., 847 F.2d 278 (5th Cir. 1988)	7
Opinions	
United States Court of Appeals for the Fifth Circuit, October 3, 1988, No. 87-6152	3
Statutes	
42 U.S.C. §1983 (1981)	2, 4
Rules	
Tex. R. Civ. P. Ann. R.18a(f) (Vernon 1988)	4

Fed. R. Civ. Pr. 12 (h)(3) 5

Fed. R. App. P. 38 6

U.S. Ct. Appeals - Fifth Circuit
Local Rule 47.5 8

QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed the district court's *sua sponte* dismissal of Petitioners' case on the grounds of lack of district court jurisdiction.

2. Whether the court of appeals abused its discretion in assessing double costs against the Petitioners for frivolous appeal.

3. Whether the court of appeals abused its discretion by declining to publish its opinion.

STATEMENT OF THE CASE

The Petitioners are involved in Texas state court domestic relations proceedings. Each of the Petitioners made a motion to recuse their presiding trial judge. Pursuant to the Texas Rules of Civil Procedure, the recusal motions were forwarded to the Honorable Thomas J. Stovall, the Respondent. After the recusal motions were denied, Petitioners filed suit against Judge Stovall seeking declaratory and injunctive relief in federal district court under 42 U.S.C. §1983(1981), alleging denial of due process. Petitioners claimed that Judge Stovall failed to provide them adequate notice of the hearings on their recusal motions. The district court abstained from any action, stating that state, and not federal court, was the appropriate forum for Petitioners' action. The request for a temporary restraining

order was denied and the case dismissed. Petitioners filed a timely notice of appeal.

In unpublished opinion No. 87-6152 rendered by the United States Court of Appeals for the Fifth Circuit on October 3, 1988, the Fifth Circuit affirmed the district court's dismissal, finding the district court lacked jurisdiction to hear the case. Additionally, the appeal was held to be frivolous, and double costs were assessed. It is this appellate decision from which the Petitioners complain in their Application for Writ of Certiorari now before this Court.

ARGUMENT AND AUTHORITIES

1. The court of appeals correctly affirmed the district court's sua sponte dismissal of Petitioners' case on grounds of lack of district court jurisdiction.

Petitioners argue the district court had jurisdiction over their claims present-

ed under 42 U.S.C. §1983 (1981), therefore the court of appeals erred in affirming the district court's dismissal of the case for want of jurisdiction.

If Petitioners had presented a deprivation of rights actionable under 42 U.S.C. §1983 (1981), federal district court jurisdiction might have been invoked. However, the only issue complained of by Petitioners was an alleged judicial error by the Texas state court. As the court of appeals correctly noted, review of Petitioners' alleged state court judicial error does not lie in federal court but can only be redressed through the state courts, and ultimately to the Supreme Court. See Tex. R. Civ. P. Ann. R. 18a(f) (Vernon 1988) and Hale v. Harney, 786 F.2d 688 (5th Cir. 1986).

Petitioners also complain that the district court could not dismiss the case sua sponte, particularly when the Defendant

had not yet been served with process. To the contrary, Fed. R. Civ. Pr. 12(h)(3) specifically provides for sua sponte dismissal for want of jurisdiction ... "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

When the federal district court determined it was without jurisdiction to hear Petitioners' complaint, it not only had the right, but also an obligation to dismiss the case on its own initiative. See Beers v. North American Van Lines, Inc. 836 F.2d 910, 912 (5th Cir. 1988) citing King from Bridge & Mfg. Co. v. Otoe County, 120 U.S. 225, 7 S.Ct. 552, 30 L.Ed. 623 (1987); Feigler v. Tidex, Inc., 826 F.2d 1435 (5th Cir. 1987); Save The Bay, Inc. v. United States Army, 639 F.2d 1100, 1102 (5th Cir. 1981).

2. The Court of Appeals did not abuse its discretion in assessing double costs against Petitioners for frivolous appeal.

It was well within the Court of Appeals' discretion to assess double costs against the Petitioners under Fed. R. App. P. 38. According to Rule 38, if a court of appeals determines an appeal is frivolous, it may award just damages and single or double costs to the appellee. The Fifth Circuit, as well as other circuits, have recently confirmed the viability of Rule 38 by assessing double costs in frivolous appeals. See Coghlan v. Starkey, 852 F.2d 806 (5th Cir. 1988).

The frivolity of Petitioners' appeal cannot be disputed. Because Petitioners had failed to allege a federal cause of action, the federal district court dismissed the case, clearly stating in its order that the case should have been brought in state court. That action alone

should have suggested to the Petitioners the futility of seeking a federal forum when no federal cause of action had been alleged. Nevertheless, in total disregard for the dictates of the court, the Petitioners sought appellate review.

The result of such review was obvious. Furthermore, as Petitioners' arguments of error were wholly without merit, the appeal was an unjustified consumption of appellate resources. The appeal was frivolous and worthy of double cost sanctions. See Atwood v. Union Carbide Corp., 847 F.2d 278 (5th Cir. 1988).

3. The court of appeals was well within its discretion by declining to publish its opinion.

Petitioners contend that the failure of the appellate court to publish its opinion was an abuse of discretion although no authority for this position is

cited in Petitioners' brief.

No need exists for the appellate decision to be published. Both parties were afforded copies of the opinion, which decision was based on the well-settled principle of federal subject matter jurisdiction. Local Rule 47.5 of the U.S. Court of Appeals for the Fifth Circuit provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession". The Fifth Circuit accordingly decided not to publish their opinion pursuant to that rule.

CONCLUSION

The court of appeals correctly affirmed the district court's *sua sponte* dismissal of Petitioners' case for want of district court jurisdiction. Petitioners alleged only a Texas state court error in the complaint filed with the federal district court. The federal court correctly recognized that it did not have jurisdiction over the case as such allegation was cognizable only in state court. As it was obligated to do by law, the federal court dismissed the case.

Dissatisfied with that result, Petitioners sought appellate review. As expected, the appellate court also found the case beyond district court jurisdiction and affirmed. Because the appeal was blatantly advanced in direct contravention with the firmly entrenched principle of federal jurisdiction, double

costs were assessed in accordance with well-established federal appellate practice.

Therefore, Respondent prays that Petitioners' Application for Writ of Certiorari be denied and for such other further relief as this Court may deem just and proper.

DATED: May 25, 1989

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

PAUL D. RICH
Office of Attorney General
200 Main Plaza, Suite 400
San Antonio, Texas 78205
State Bar No. 16842500
512-225-1154

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Brief of Respondent was sent by certified mail, return receipt requested to the following:

Mr. Bill Hamilton #P 130 296 391
214 W. Broadway
Pasadena, TX 77506

Mr. Michael Gleason #P 130 296 392
P.O. Box 6151
Pasadena, TX 77506

Mr. Dan Linkous #P 130 296 393
1526 Kingwood Drive
Kingwood, TX 77339

Gilbert F. Ganucheau #P 130 296 394
U.S. Court of Appeals
for the Fifth District
600 Camp Street, Room 100
New Orleans, LA 70130

on this the 25th day of May, 1989.

PAUL D. RICH
Office of Attorney General